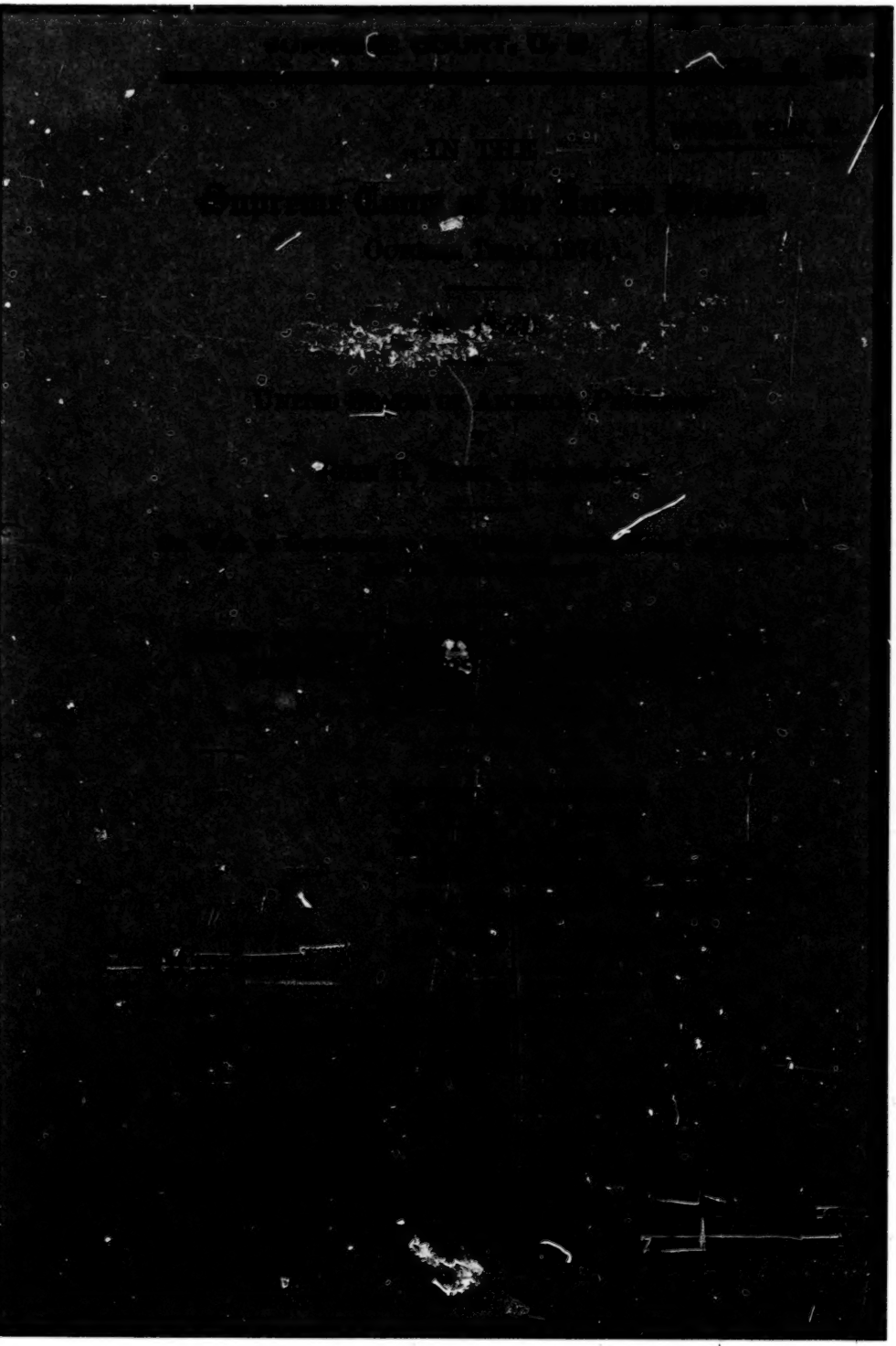

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CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-215

UNITED STATES OF AMERICA, *Petitioner*

v.

JOHN R. PARK, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Synthetic Organic Chemical Manufacturers Association ("SOCMA") is an industry association of 72 member companies engaged in production of synthetic organic chemicals. A number of such chemicals constitute or are used in products subject to regulation

under the provisions of the Food, Drug and Cosmetic Act of 1938, as amended ("the Act" or "the Food and Drug Act"), 21 U.S.C. §§ 301 *et seq.* (1972). SOCMA and its member companies thus have an interest in the interpretation accorded the Food, Drug and Cosmetic Act, and in even-handed, non-discriminatory enforcement of the provisions of the Act.

QUESTION PRESENTED [1]

Whether a doctrine of vicarious liability, in addition to the doctrine of strict liability approved in *United States* v. *Dotterweich*, 320 U.S. 277 (1943), should be read into the criminal penalty provisions of the Federal Food, Drug and Cosmetic Act to sustain the conviction of a corporate officer for violations of that Act.

STATUTE INVOLVED

The defendant at trial (respondent here) was charged [2] under Section 303 of the Federal Food, Drug

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[1] In addition to the question of statutory construction (and underlying constitutional requirements) discussed in this *amicus* brief, the Government as petitioner has posed and addressed a second question which will not be dealt with by *Amicus*. This second issue is whether admission of evidence of an alleged prior criminal offense not the subject of conviction was prejudicial error.

[2] Substantively, the charges were based upon non-compliance with Section 301(k) of the Act, as amended, 21 U.S.C. § 331(k) (1972):

> The following acts and the causing thereof are prohibited:
>
> . . .
>
> (k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after ship-

and Cosmetic Act, as amended, 21 U.S.C. § 333 (1972), which provides in material part:

> (a) Any person who violates a provision of section 331 [§ 301 of the Act] of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both.
>
> (b) Notwithstanding the provisions of subsection (a) of this section, if any person commits such a violation after a conviction of him under this section has become final, or commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than $10,000, or both.

STATEMENT

By information, the United States charged a food store chain, Acme Markets, Inc., and its president, John R. Park, with violations of Section 301 of the Act, 21 U.S.C. § 331 (1972), based on the presence of rodents in Acme's Baltimore warehouse. Acme's headquarters, including Park's office, is in Philadelphia.

Prior to trial, Acme entered a plea of guilty to the counts of the information. The counts against Park were tried to a jury. On May 10, 1973, Park was found guilty, and subsequently he was fined a total of $250.

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ment in interstate commerce and results in such article being adulterated or misbranded.

"Adulterated" is then defined by Section 402(a) of the Act, 21 U.S.C. § 342(a) (1972), as follows:

> A food shall be deemed to be adulterated . . . (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health . . . .

The trial was marked by controversy and disagreement over whether the jury should be instructed that Park's position as president of Acme was a sufficient factual predicate of "responsible relation" or "responsible share" in the violations for a finding of his personal guilt, under the interpretation given the Act in *United States* v. *Dotterweich,* 320 U.S. 277 (1943). Much of the Government's evidence at trial consisted of a reading into the record of Acme's by-laws insofar as they described the Acme President's duties. Consistent with this approach, the Government urged the trial court to adopt jury instructions which allowed the jury to find Park guilty based upon the theory of strict liability espoused in *Dotterweich,* coupled as well with application of a vicarious liability concept. Over strong objection, the trial court approved and gave instructions substantially in the form requested by the Government:

> *The main issue for your determination is . . . whether the Defendant held a position of authority and responsibility in the business of Acme Markets.*
>
> The corporation, Acme Markets, Incorporated, has already entered a plea of guilty to the charge placed against it, and, while that plea does not imply, in any way, the Defendant Park is guilty, the fact that the materials in question are foods held for resale after shipment in interstate commerce and held under unsanitary conditions are issues that are beyond question in the case and must be accepted by you.
>
> The statute makes individuals, as well as corporations, liable for violations. An individual is liable if it is clear, beyond a reasonable doubt, that the elements of the adulteration of the food as to travel in interstate commerce are present. *As I*

have instructed you in this case, they are, and that the individual had a responsible relation to the situation, even though he may not have participated personally. (A. 61-62.) (Emphasis added.) [3]

The court of appeals reversed, holding that "a finding of guilt must be predicated upon some wrongful action by Park. That action may be gross negligence and inattention in discharging his corporate duties and obligations or any of a host of other acts of commission or omission which could 'cause' the contamination of the food". 499 F.2d 839, 842 (1974). The court of appeals rejected the Government's trial position that the Food and Drug Act authorized conviction of a firm's officer on the combined scourge of strict liability plus vicarious liability. As the court said respecting vicarious liability: "It is the defendant's relation to the criminal acts, not merely his relation to the corporation, which the jury must consider; 21

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[3] The Court continued:

> The individual is or could be liable under the statute even if he did not consciously do wrong. However, the fact that the Defendant is president and is a chief executive officer of the Acme Markets does not *require* a finding of guilt. Though, he need not have personally participated in the situation, he must have had a responsible relationship to the issue. The issue is, in this case, whether the Defendant, John R. Park, *by virtue of his position in the company*, had a position of authority and responsibility in the situation out of which these charges arose. (*Id.*) (Emphasis added.)

By adding its caveat that Park's position as president of Acme did not "require" a finding of guilt, the trial court seems to have said that it could not direct a verdict of guilty—*i.e.*, while Park's position did not "require" finding of guilt, the jury "may" or "could" make such a finding based upon Park's position as defined and elaborated in Acme's by-laws.

U.S.C. § 331 is concerned with criminal conduct and not proprietary relationships". *Id.* at 841.

The dissenter in the court of appeals had very little to say about the jury instructions, but he did refer to "the prosecutor's argument to the jury" in concluding "that there was no effort to equate the presidency of the corporation with the responsibility." *Id.* at 844 (Craven, J., dissenting). However, the dissenter demonstrated affirmatively that he was muddling vicarious liability concepts with those of strict liability:

> "I am sympathetic with my brothers' sense of justice that prompts them, it seems to me, to write into the statute some small degree of mens rea or scienter as a prerequisite to liability, but I share the government's fears that today's decision will undermine the congressional purpose of protecting 'the innocent public who are wholly helpless' to protect themselves from contaminated food." (*Id.* at 845.)

SUMMARY OF ARGUMENT

The court below separated the issue of vicarious liability from that of strict liability under the Act and correctly analyzed the decision of this Court in *Dotterweich* as requiring a factual nexus between the conduct of an officer of a company and the violation before holding the officer personally liable. *Dotterweich* interpreted the Food and Drug Act as dispensing with *mens rea* and thus imposed a strict liability for violations. However, the decision in that case made clear that to hold an officer liable, his conduct must bear a "responsible relation" to the offense. Dotterweich was in fact not only president and general manager but a straw boss who supervised a small group of employees who shipped the drugs in violation of the Act. When

this Court spoke of the factual basis for personal liability in this context, it referred to "acts" and "conduct" from which a jury could find the officer did "responsibly contribute" and had a "responsible share" and a "responsible relation" to the violation.

The trial court accepted the Government's theory of vicarious responsibility and under its instructions the jury could have found Park liable by reason of his position as president without any showing of factual nexus to the violation by conduct. The Government has now retreated minimally from its trial position of combining vicarious liability with strict liability and is asking the Court to endorse the unsound principle that the constitutional requirement that the Government prove its case beyond a reasonable doubt is satisfied by a showing of the title of an officer and the broad scope of his duties under company by-laws without any showing of personal acts or conduct which provide a factual nexus with the violation. It is up to the officer then, the Government proposes, to bear the burden of showing he was "powerless" in the situation.

The Court should reject the Government's attempt to misuse the phrase "responsible relation", which this Court used in *Dotterweich* to describe the requisite element of personal conduct or action, as a device for imposing vicarious responsibility. This case demonstrates the unsoundness of the Government's contention that the basic issue of vicarious criminal liability can be solved by trusting the discretion of the prosecutor.

ARGUMENT

Introduction

Each of the opinions filed by the court of appeals focus on the meaning of the phrase "responsible relation", in recognition of the fact that this expression embodied the concept in the *Dotterweich* case that an individual could be held criminally accountable if he has a "responsible share in the furtherance of the transaction which the statute outlaws . . . ." (320 U.S. at 284.) The Court in *Dotterweich* eschewed any attempt to construct a formula which defined "the variety of conduct whereby persons may responsibly contribute to furthering a transaction" forbidden by the Act (*id.* at 285), leaving explication of "responsible relation" to jury instructions depending upon the factual situation presented to the trial court. Whatever the circumstances, however, the phrase necessarily connotes a required nexus of a responsible contribution by the person charged to the alleged violation, not a relation merely to the corporation or other entity also alleged to have been a violator.

The Government in its brief on the merits in this Court appears to have retreated slightly from its trial position that the Food and Drug Act contemplates personal criminal liability based upon a combination of strict and vicarious liability precepts. Now, the Government appears to argue that the corporate officer's position may be a sufficient factual predicate for a finding of his personal guilt, and that the burden of proof then shifts to the officer to show that his powers within the company were too weak for such a finding:

> While the liability created by the 1938 Act is strict, it is not vicarious. The limits of the principle appear in its articulation: the corporate officer must

> stand in a responsible relation to the prohibited acts; a claim that he is "powerless" may "be raised defensively at a trial on the merits". *United States* v. *Wiesenfeld Warehouse Co.*, 376 U.S. 86, 91. (Brief for the United States at 14.)

In short, the Government now says the personal criminal susceptibility under the Food and Drug Act is based upon strict liability plus vicarious responsibility, subject to a "powerlessness" defense.[4]

A. Prior Opinions of the Court Do Not Sanction Application of the "Tyrannous Combination" [5] of Strict and Vicarious Liability

A precise and concise author has set out the attributes of strict and vicarious criminal liability:

> The distinction between strict and vicarious responsibility has never been properly explained by the judges . . . . The full difference is this: strict responsibility does not dispense with something like a personal actus reus, whereas vicarious responsibility does. Conversely, strict responsibility dispenses with the need for mens rea altogether, whereas vicarious responsibility does not dispense with the need for mens rea on the part of the servant. *The same statute may, of course, create both strict and vicarious responsibility. In that event, since the responsibility is strict, there will be no need to prove mens rea on the part of anyone; and since the responsibility is vicarious, there will be no need to prove an actus reus on the part of the accused master.* It may be hoped that such a tyrannous combination will be found to be rare. (Wil-

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[4] This "defense" speaks not to the vicarious responsibility issue, but appears to be a proposed exception to the strict liability precept. See *infra*, at 18 n. 9.

[5] Williams, *Criminal Law: The General Part*, 286 (1953).

liams, *Criminal Law: The General Part,* at 285-86 (1953) (emphasis added).)

Application of both strict and vicarious liability (or responsibility) runs against the grain of American principles of fairness in application of criminal laws. It is hardly surprising that the court of appeals in the present case cast aside the Government's strongly-pressed arguments and insisted upon personal "acts" or "conduct", whether of "commission or omission". (499 F.2d at 841-42.) No prior decision of this Court provided a mandate to the court of appeals to abjure its distaste for vicarious criminal responsibility ideas. Certainly when this Court reinstated Dotterweich's conviction twenty years earlier, it had before it facts which established Dotterweich's personal involvement in the Food and Drug Act violation, even though those facts were not set out at length in the statement of the case. See *United States* v. *Park,* 499 F.2d 839, 841 n. 3 (4th Cir. 1974), commenting upon *United States* v. *Dotterweich,* 320 U.S. 277 (1943). Similarly, in *United States* v. *Balint,* 258 U.S. 250 (1922), and *Morissette* v. *United States,* 342 U.S. 246 (1952), the accused's conduct was apparent; the question before the Court was one of strict liability and not vicarious liability.

In *United States* v. *Balint,* 258 U.S. 250 (1922),[6] the defendants were charged with having sold an opium derivative and a derivative of coca leaves in violation of the Narcotic Act of 1914. The question was whether knowledge was an element of the offense charged. The

[6] On the day it rendered the *Balint* decision, the Court also held in *United States* v. *Behrman,* 258 U.S. 280 (1922), that a licensed physician was strictly responsible under the Narcotic Act of 1914 for improper prescriptions.

Court rejected the argument that the absence of a scienter element deprived the accused of constitutional due process guarantees, relying upon *Shevlin-Carpenter Co.* v. *Minnesota,* 218 U.S. 57 (1910). It ruled that in the Narcotics Act of 1914 Congress had provided for strict liability.

Twenty years later, when in *United States* v. *Dotterweich,* 320 U.S. 277 (1943), this Court had before it the question of whether strict liability applied to the Food and Drug Act, it gave an affirmative answer in reliance upon *Balint:*

> The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct-awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. *United States* v. *Balint,* 258 U.S. 250. (320 U.S. at 280-81.)

In so doing, it affirmed the conviction of Dotterweich for two violations: shipping understrength digitalis tablets and shipping a cascara compound that conformed to specifications but included a reference to an ingredient that had, a short time before, been dropped from the National Formulary. Dotterweich was the president, general manager and straw boss of a very small company (26 employees) which purchased drugs from manufacturers, repackaged them under its own label, and shipped them to order to physicians.[7]

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[7] The instruction cited by the Government (Brief for the United States, at 24) obviously was aimed at the evidence.

Mr. Justice Frankfurter's opinion for the Court majority in *Dotterweich* did not stop with the strict liability issue, however. The court of appeals had reversed Dotterweich's conviction by construing the reach of the Act's penalty section in light of the scope of a guaranty provision in the Act which immunized a recipient of a regulated product where the seller gave a guaranty of the innocence of the product. The Court rejected the limitation on the penalty provision, but recognized the concern of the court of appeals that the penalty provision "might operate too harshly by sweeping within its condemnation any person however remotely entangled in the proscribed shipment". (320 U.S. at 284.) The Court's safeguard was found in its requirement that the accused have a definite personal nexus with the offense: "To speak with technical accuracy, under § 301 a corporation may commit an offense and all persons who aid and abet its commission are equally guilty". (*Id.*) And, as the Court restated the point: "The offense is committed . . . by all who do have such a *responsible share* in the furtherance of the transaction which the statute outlaws . . . ." (*Id.*) (emphasis added.) The *Dotterweich* Court recognized the difficulty in describing who such a chargeable official might be:

> "It would be too treacherous to define or even to indicate by way of illustration the class of employees which stand in such a responsible relation. To attempt a formula embracing the *variety of conduct* whereby persons may responsibly contribute in furthering a transaction forbidden by an Act of Congress, . . . would be mischievous futility." (*Id.* at 285.) (Emphasis added.)

The Court thus purposefully left further definition of the term "responsible share" or "responsible rela-

tion" to future cases. For example, the Court noted that violations could be "furthered" by persons "standing in various relations to the incorporeal proprietor". (*Id.* at 283.) Nevertheless, in spite of imprecision in the term "responsible share", *Dotterweich* and the cases following it make it clear that the mere fact that an individual holds a position in an enterprise carrying with it broad supervisory and administrative power is not sufficient to impose criminal liability on that individual. Indeed, the Court pointedly referred to a "variety of conduct". (*Id.* at 285) And, it had used the term "responsible" in the opinion in connection with its explanation of the penalty provision's imposition of misdemeanor sanctions upon both corporations and individuals:

> But the only way in which a corporation can act is through the individuals who act on its behalf. *New York Central & H.R.R.Co.* v. *United States,* 212 U.S. 481. And the historic conception of a "misdemeanor" makes all those responsible for it equally guilty, *United States* v. *Mills,* 7 Pet. 138, 141, a doctrine given general application in § 332 of the Penal Code (18 U.S.C. § 550). (*Id.* at 281.)

The reference to *United States* v. *Mills,* 32 U.S.(7 Pet.) 430 (1833), is illuminating because that case is an early decision of this Court approving a misdemeanor charge for "advising, procuring, and assisting" a mail carrier to rob the mails. (*Id.* at 431.) Thus, the *Mills* case definitely spoke of responsibility in terms of conduct, and the Court in *Dotterweich* was indicating its adherence to that time-tested position.

Despite these references to "conduct" and "act" and the juxtaposition of "responsibly contribute", responsible share" and "responsible relation" with "advis-

ing, procuring, and assisting", some have read the Court's *Dotterweich* opinion as bearing on vicarious responsibility. For example, Professor Packer states:

> The court of appeals opinion had at least the merit of keeping separate two questions that it would confound analysis to blur: first, whether whoever was responsible for the shipment could be held criminally liable, notwithstanding the absence of culpability on his part (the issue of "strict liability"); and second, whether Dotterweich could be held criminally liable, notwithstanding his own lack of connection with the shipment (the issue of "vicarious liability"). It is obvious that the second issue is dependent on the first; if no one committed a crime, there was no crime for which Dotterweich could have been held vicariously liable. The underlying issue was whether the statute imposed strict liability.
>
> The opinion for the Court, by Mr. Justice Frankfurter, did not make the essential distinction between the issues of strict and vicarious liability. It is not paraphasing unfairly to say that the Court held that since the liability was strict it was also vicarious. (H. Packer, *The Limits of the Criminal Sanction,* at 124-25 (1968))

Professor Packer, however, focused on the Court's conclusion that the Act dispensed with *mens rea* and did not analyze the Court's references to "act", "conduct" and "responsible share" in relation to vicarious liability. Perhaps he was influenced by the lack of factual description of Dotterweich's activities in any of the opinions, but as the court of appeals pointed out in its *Park* opinion, Dotterweich was the president and general manager of a small company with twenty-six (26) employees and he had direct supervisory responsibility over the physical acts which resulted in the violation charged. (499 F.2d at 841 n. 3.)

Roughly ten years after *Dotterweich,* the strict liability issue arose again in *Morissette* v. *United States,* 342 U.S. 246 (1952). There, however, the Court held that failure to specify criminal intent in a statute punishing theft or conversion of government property by fine or imprisonment would not be construed as eliminating that requirement. As the Court phrased it, "the ancient requirement of a culpable state of mind" is as "universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil". *(Id.* at 250.) There also, the Court noted that imposition of criminal punishment for "public welfare offenses" without such criminal intent, where "penalties commonly are reasonably small, and conviction does no grave damage to an offender's reputation", was a development which "has not, however, been without expressions of misgiving". *(Id.* at 255-56.)

It would be "tyrannous" indeed for this Court to couple the strict liability concept approved with at least some "misgivings" in *Dotterweich* with vicarious responsibility principles. No majority of this Court has ever indicated a willingness to follow such a course, and the Court should not do so now.

B. The Trial Court's Instructions Impermissibly Reflected Application of Vicarious Responsibility Principles

A most serious excursion from the *Dotterweich* principles occurred in the trial court's instructions to the jury. As noted in the statement of the case, *supra,* at the Government's urging the trial court instructed the jury that it *could* infer the requisite responsible relation of Park to the violation simply from his position in Acme. After defining the elements

of interstate shipment and unsanitary conditions, the court stated the crucial third element of the charged offenses as—

> "Thirdly, that John R. Park held a position of authority in the operation of the business of Acme Markets, Inc.
>
> "However, you need not concern yourselves with the first two elements of the case. The main issue for your determination is only the third element, whether the Defendant held a position of authority and responsibility in the business of Acme Markets." (A. 61.)

After this opening statement of the conduct element, the trial court told the jury that the accused would have the necessary responsibile relation to the violation "even though he may not have participated personally". *(Id.)* And, further, the charge told the jury that "the fact that the Defendant is [president] and is a chief executive officer of the Acme Markets does not *require* a finding of guilt" *(id.* (emphasis added)), implying from the context that it *may* lead to such a finding. In short, by its instructions, the Court may well have confused the jury into believing that since defendant was president, a "position of authority and responsibility", he *could* be held responsible for the violation *without more*. This instruction thus allows conviction on the basis of a vicarious responsibilty. It accordingly contravenes the *Dotterweich* requirements of "conduct" and "acts" (whether of commission or omission) before a "responsible relation" to the offense could be found.

There is sparse evidence in the record that Park did have a role in directing the regional vice-president for the pertinent area to correct the violation, and the Government properly emphasizes that evidence as a

good advocate. (Brief for the United States, at 7-8, 17.) Nevertheless, the Government's case-in-chief at trial on the issue of responsible relation was mainly concerned with a reading of the Acme by-laws describing Park's duties. (*Id.* at 6-7). Accordingly, the Government's evidentiary approach at trial emphasized the erroneous aspect of the trial court's instructions, rather than serving to ameliorate it.

In addition, the Government's choice of Park as the sole individual defendant in the face of possible involvement of a number of other Acme officials illustrates the capricious and invidious nature of the danger inherent in allowing principles of vicarious responsibility to creep into the criminal law. The record indicates that the Government was well aware of possible involvement in some way of at least the following several Acme officials: the executive vice-president for sales and operations, Mr. Hammel; the vice-president for engineering, Mr. Fahlhaber; the Baltimore Division vice-president, Mr. McCahan; and the sanitation inspection engineer, Mr. Bronsdon. Each of these persons had or could have had some brush with the specific Baltimore warehouse situation which was the subject of the criminal information. In the face of these possibilities, the Government chose only Park and offered no rationale for thus charging him, leaving as the only possible conclusion that they wanted the "head man" without regard to his actual relationship to the violation. [8]

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[8] Such an exercise of prosecutorial discretion was clearly done on a far too vague and suspect basis, allowing as it has in this case for one official to be selected at random for prosecution solely on the basis of his position within the firm. The prosecution in this case also demonstrates that "prosecutorial discretion" and governmental "good faith" cannot be relied upon as the sole vehicle through which *Dotterweich's* principles are carried out.

Correction of the erroneous path of both the Government's prosecution and the trial court's instructions is necessary. Minimally, the spectre of vicarious liability should be firmly banished. And, a further delineation seems in order. If this case and the commentator's expressions of concern are any guide, in these strict liability prosecutions elements of vicarious responsibility are all too likely to be muddled into trial court instructions shaped to meet the situation at hand with very few if any time tested models upon which to rely except the concept that "conduct" and "acts" are necessarily involved in a "responsible relation". In the absence of personal nexus to the situation resulting in the violation, the rationale for finding an official "responsible" disappears, and prosecution of him or her takes on an *in terroreum* aspect.

Further, the lack of a relationship between the official's activities and the violation raises the potential for serious due process problems in the course of any prosecution of the official. These problems could take the form both of a lack of notice of potential liability to an official who is exercising all due care, and of a failure to fulfill the constitutional requirement that the prosecution must prove all elements of the crime against the defendant. [9]

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[9] The lack of parameters for the definition of "responsible" may all too often, as in this case, be construed as requiring that the defendant prove he was not "responsible", rather than the prosecution's bearing the burden of demonstrating that he was. The Government is not correct in its assertion that *United States* v. *Wiesenfeld Warehouse Co.*, 376 U.S. 86 (1964), sanctions remitting an accused official to such a defense, where the accused would bear the burden of proof. *Wiesenfeld* dealt with the peculiar situation where a public storage warehouseman was charged with violating the Food and Drug Act by "holding" adulterated articles. The cryptic *Wiesenfeld* opinion seems to hold that the "pow-

Of further concern is the deleterious effect this lack of a nexus between the violation and the official charged as "responsible" will have on the deterrence sought to be created by the imposition of strict liability. The strict criminal liability aspect of the public welfare laws was intentionally designed so that the potential of punishment would act as a uniquely "effective means of regulation", 320 U.S. at 280-281, which would ensure that "degree of diligence for the protection of the public which shall render violation impossible". *People* v. *Roby*, 52 Mich. 577, 579, 18 N.W. 365, 366 (1884). But obviously this regulatory mechanism is correctly described as "tyrannous" if applied vicariously against a corporate official whose normal exercise of duties bore no relationship to the area of operations in which the violation occurred. Therefore, if an official used due care in his regular course of activities ~~activities~~ and the violation still occurred, he is not a "responsible" official who should have criminal penalties imposed upon him, for such penalties can serve no deterrent purposes.

The Government, in defense of respondent's contention in the court of appeals that the Government arbitrarily exercised its prosecutorial discretion, offers to this Court a rather detailed explication of its guidelines for bringing prosecutions of this sort. See Brief for the United States, at 31-32. The Government's

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erlessness" of the warehouseman would be a defense to the strict liability aspect of the violation, and would allow a limited exception to that doctrine. The warehouseman did not contend that he had not engaged in the requisite conduct in actually "holding" the articles; this aspect of the *Wiesenfeld* case would have reflected vicarious liability principles. The Government's analysis of *Wiesenfeld* illustrates the danger in not clearly and sharply delineating vicarious responsibility from strict liability.

position seems to be that it has voluntarily imposed upon itself restraints pertaining to its determination of whether a suspect individual bears a "responsible relation" such that the person should be charged, but that these restraints disappear at trial and are not to be reflected in the trial court's charge to the jury. This anomalous result should be corrected.

The Government says its policy [10] is —

> to prosecute only those individuals who are in a position and who have an opportunity to prevent or correct violations but fail to do so. Officials who lack authority to prevent or correct violations, or who were totally unaware of any problem and could not have been expected to be aware of it in the reasonable exercise of their corporate duties, are not the subject of criminal action. Even if investigation discloses the elements of liability, and indicates ~~indeiates~~ that an official bears a responsible relation to them, the agency will not ordinarily recommend prosecution unless that official, after becoming aware of possible violations, often (as with Park) as a result of notification by FDA, has failed to correct them or to change his ~~mon~~ managerial ~~agrial~~ system so as to prevent further violations. In those instances where prosecution is brought, it is brought for past as well as t[h]e most recent, violations. *Id.* at 31-32.) (footnote omitted)

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[10] The Government's policy guidelines respecting the substantive conditions justifying criminal charges, or as the Government's brief denominates them, the "FDA's standards for reference of cases to the Department of Justice for prosecution" (*id.* at 31), appear to be reasonable. As the Government reports them, they include "continuing violations of law (*e.g.*, continuing insanitary conditions in a food plant); violations of an obvious and flagrant nature (*e.g.*, food warehouse overrun with rodents, birds and insects, which contains plainly contaminated products); and intentionally false or fraudulent violations". (*Id.*)

The more restrictive elements of the Government's "policy" would seem to be logical candidates for defining the Government's burden of proof and for inclusion in an instruction which would give the jury some guidance respecting whether an individual defendant's conduct or acts provided the requisite personal responsibility for imposition of criminal sanctions. For example, in this case what facts are shown by the record indicate that Park had no personal involvement at all with the violations found by the FDA inspector in his initial December 1971 inspection of the older building in Acme's Baltimore warehouse complex. Park never should have been charged with the counts arising from the December 1971 visit. His "responsibility", if any, is purely vicarious. The violations stemming from the subsequent March 1972 inspection of the same warehouse *conceivably could* stand in a different posture. This record, however, is very sparse, showing primarily that Park received a letter from the FDA respecting the initial inspection and referred it to the responsible regional vice-president for corrective action. The sparse development of the record on Park's personal involvement for the second series of violations could have been prevented had the Government's trial theory been focused on "conduct" or "acts" whether of omission or commission, as *Dotterweich* requires, rather than on principles of vicarious liability. In short, the portion of the Government's policy which relates to personal involvement should be built into jury instructions, and the trial of the accused should be conducted on that basis. The Government is simply barking up the wrong tree when it puts forth its policy as an answer to claims that its prosecutorial discretion had been arbitrarily exercised, and then turns right around and advocates that the actual

criminal trial of the accused can proceed using vicarious liability precepts.

In the past, apparently the Government has not so vigorously embraced vicarious responsibility principles. At least other reported cases exploring the issue of criminal liability of corporate officials support the Court of Appeal's view that *Dotterweich* requires that a "responsible" corporate official be one whose activities had some nexus with the occurrence of the violation. These cases all involve prosecutions of corporate officials who either were normally present at the site where the violation occurred or whose fulfillment of his duties entailed regular, direct inspections of the processes in which the violation appeared. See, *United States* v. *Cassaro, Inc.*, 443 F.2d 153 (1st Cir. 1971); *Lelles* v. *United States*, 241 F.2d 21 (9th Cir. 1957), *cert. denied*, 353 U.S. 974 (1957); *United States* v. *Kaadt*, 171 F.2d 600 (7th Cir. 1948); *United States* v. *Hohensee*, 243 F.2d 367 (3rd Cir. 1957); *United States* v. *Diamond State Poultry*, 125 F. Supp. 617 (D. Del. 1954); *Golden Grain Macaroni Co.* v. *United States*, 209 F.2d 166 (9th Cir. 1953). Interestingly enough, the one case the Government points to as demonstrating that such a presence or involvement is *not* necessary, *United States* v. *Parfait Powder Puff Co.*, 163 F.2d 1008 (7th Cir. 1947), *cert denied*, 332 U.S. 851 (1948), is a case in which *no individual* corporate official was charged and the corporation itself was the only defendant. See Brief for the United States, at 26.

These cases, therefore, present a pattern which the Court of Appeals has correctly noted and followed as being required by *Dotterweich's* formulation of a "responsible" corporate official; that is, that a mere position of general authority and supervision in a cor-

poration is never sufficient; to be held as "responsible" a demonstration must be made of the nexus between the actual functioning of a person occupying that position and the occurrence of a violation. The court of appeals' decision's analysis of the *Dotterweich* case is particularly apposite in this regard, revealing as it does that *Dotterweich* itself was a case following the pattern above where the charged official was physically present and *personally* and *directly* made the executive and supervisory decisions. Far from being the dilatory discussion misguidedly focusing on the issue of size, as the Government has characterized it (Petition for Certiorari for the United States, at 12), this presentation of the factual background of *Dotterweich* is the ultimate confirmation of that case's requirement of a construction and utilization of the term "responsible" based on the relationship between the violation and the official, and of the correctness of the court of appeals' reasoning and result.

CONCLUSION

The Government in its brief would have this Court embark upon the perilous course of infusing concepts of vicarious responsibility into the criminal penalty provisions of the Food and Drug Act. There such principles would tyrannically combine with the concepts of strict liability previously approved by this Court in *Dotterweich*. The vicarious responsibility spectre is made particularly malevolent because the Government has cloaked this idea by the billowing fabric of the strict liability doctrine.

The Court in *Dotterweich* used the phrase "responsible relation" as a shorthand for describing the requisite element of personal conduct or action. That short-

hand should not be perverted into a vehicle for employing the very vicarious responsibility ideas the Court in *Dotterweich* was trying to avoid, as the Court has always avoided them, at least to date.

This Court should identify and sort out the vicarious responsibility aspects of the facts and of the Government's position. Then, it should reject them firmly.

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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